

**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	No. 05-CV-329-GKF(SAJ)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**MOTION IN LIMINE TO EXCLUDE TESTIMONY OF
MARCIA WILLIAMS AND RICHARD FORTUNA**

COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State"), and respectfully requests that this Court issue an order excluding the testimony of Marcia Williams and Richard Fortuna on the ground that they are not providing expert testimony, but rather offering legal conclusions. Legal conclusions are improper conclusions for purported expert testimony. In support of its Motion, the State states:

1. Defendants have submitted a number of affidavits in opposition to the State's Motion for a Preliminary Injunction. *See* DKT #1531. Two of these affidavits, Richard Fortuna and Marcia Williams, simply offer legal conclusions concerning federal law. Therefore, they should be excluded.

2. Richard Fortuna is a former Congressional staffer whose self-described expertise is environmental policy. His opinions include opinions about RCRA's legislative history, regulatory framework and exclusions, and the policy implications for a ruling adverse to Defendants. Mr. Fortuna's affidavit recites the law, the legislative history, regulations and cases,

and then discusses the policy ramifications of an adverse ruling. Mr. Fortuna even cites the State's brief and then argues against the brief on legal and policy grounds. In short, Mr. Fortuna's affidavit is not an expert opinion, but a legal brief in opposition to the State's Motion.

3. Marcia Williams is a former regulator at the United States Environmental Protection Agency. She provides opinions concerning RCRA's purpose, legislative history, regulatory framework and exclusions. Like Mr. Fortuna, Ms. Williams' affidavit is essentially a legal brief, arguing to the Court that RCRA should not apply in this case and if it was applied in this case, then bad things would happen. Again, her affidavit is simply a brief in opposition to the State's motion, not an expert opinion.

4. Mr. Fortuna and Ms. Williams' argument and discussion of RCRA and its meaning are not proper expert opinion. The interpretation of statutes and regulations presents questions of law, to be decided by the Court. *See Chandris, Inc. v. Latsis*, 515 U.S. 347, 369 (1995); *United States v. Montoya*, 827 F.2d 143, 146 (7th Cir. 1987) (collecting cases); *Union Pacific Land Resources Corp. v. Moench Inv. Co., Ltd.*, 696 F.2d 88, 93 n. 5 (10th Cir. 1982); *Wollan v. United States Department of Interior*, 997 F.Supp. 1397, 1403 (D. Col. 1998) (expert's "legal opinion as to what the homestead laws say or do not say . . . is inapposite. Where the ultimate issue is a question of law, the opinion of a legal expert, even a lawyer, interferes with the judge's role as 'sole arbiter of the law' and should not be allowed"); *Mycogen Plant Science, Inc. v. Monsanto Co.*, 1995 WL 1612537, *3 (S.D. Cal. Sept. 22, 1995) ("Mycogen has submitted a declaration from an expert who was involved in the legislative process. The declaration expresses support for Mycogen's position. The court rejects this declaration as irrelevant to the question of statutory interpretation which is a task for the court to carry out by looking at the language of the statute and the legislative history, rather than by surveying expert

opinion"); *Cf. Kansas v. Colorado*, 1994 WL 16189353, *155 (U.S. October 03, 1994) (report of Special Master) (rejecting purported expert opinions because they simply discussed the law and relevant administrative actions).

5. In general, federal courts have found expert testimony on issues of law, either giving a legal conclusion or discussing the legal implications of evidence, to be inadmissible. *Specht v. Jensen*, 853 F.2d 805, 809 (10th Cir. 1988) (holding that allowing expert opinion concerning a legal conclusion was a reversible error); *see also Estes v. Moore*, 993 F.2d 161, 163 (8th Cir. 1993); *United States v. Jungles*, 903 F.2d 468, 477 (7th Cir. 1990) ("To the extent the expert would have simply recited legal principles surrounding the 'independent contractor' relationship, the trial court's exclusion of this testimony was proper"); *Pinal Creek Group v. Newmont Mining Corp.*, 352 F.Supp.2d 1037, 1043 (D. Ariz. 2005) ("In addition to prohibiting legal expert testimony which defines the governing law, courts have also prohibited legal expert opinion which applies the law to the facts").

6. As the Tenth Circuit has stated, "[e]xpert testimony of this type is often excluded on the grounds that it states a legal conclusion...." *United States v. Simpson*, 7 F.3d 186, 188 (10th Cir. 1993); *United States v. Dallion Lavell Banks*, 2008 WL 276053, *6 (10th Cir. Feb. 1, 2008); *Wollan*, 997 F.Supp. at 1403 ("When a legal opinion is given in an affidavit form, it should be stricken"). As the Fifth Circuit has astutely noted, "if an expert were allowed to testify to legal questions, each party would find an expert who would state the law in the light most favorable to its position" *Estate of Sowell v. United States*, 198 F.3d 169, 172 (5th Cir. 1999) (quotation and citation omitted); *North American Speciality Insurance Co. v. Britt Paulk Insurance Agency, Inc.*, 2007 WL 2688167, *3 (E.D. Okla. Sept. 10, 2007) (same).

7. For these reasons, therefore, the testimony of Richard Fortuna and Marcia Williams should be excluded.

Respectfully Submitted,

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